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CURRENT TOPICS.

An interesting question in mercantile law was decided by the English Court of Appeal in the recent case of Duncan v. North, &c., Wales Bank, 27 W. R. 521, where it was ruled that where bankers hold security given them by customers for the payment of any balance on account current or otherwise, and, in the ordinary course of business while holding such securities, they discount bills which have been accepted or indorsed by those customers, they are not bound to apply the security in discharge of the liability of such customers on the bills, but may deal with it without reference to those transactions. In this case, one of a firm deposited with the firm's bankers security belonging to himself, to secure the general balance of the firm for the time being. The firm subsequently accepted certain bills in favor of the plaintiffs, who procured the bankers to discount them. Upon the insolvency of the firm, the plaintiffs claimed that the securities held by the bankers must be applied in discharge of the sums due on the bills. The plaintiffs claimed that they were mere sureties (the firm being the principal debtors), and were entitled to contribution, and the vice chancellor sustained this claim The Court of Appeal reversed this, holding that without the consent of the bankers, or their knowledge of the real position of the other parties, the plaintiffs should be treated as sureties, so as to prevent the bank from dealing in their own way with the securities they held. "No bank," said the Master of the Rolls, "which held a security, either by way of suretyship or by way of deposit from its customers, could venture to discount a bill with eight or ten names on it, without examining carefully to see if any one of the names was the name of a debtor to the bank who had given them security, and if they did, they might be put in the position of being incapacitated from carrying on their dealings with their customers by varying the securities given by that customer to the bank. It shows at once that to extend the doctrine to such a case would paralyze the business of discounting bills of exchange, and that it would be unwise, as far as this court is concerned, to extend for the first time the doctrine of principal and surety, which for certain purposes extends to bills of exchange, to such a transaction as this. On this ground alone I think the decision cannot be supported." JAMES, L. J., added: "What I desire to say is this, that, as a matter of mercantile law, and I say this for the purpose of preventing any embarrassment which would be certain to arise from an extension of the rule in mercantile cases of this kind, the equities of principal and surety can not arise accidentally and promiscuously from the position of names on the face or the back of a bill of exchange which a man hands to his banker or to a merchant in the ordinary course of business, and that where a man takes a bill of exchange to a banker or a bill broker, and asks him to lend money on it, which he does, he is still the principal debtor, and he has no right to ask, nor has the banker or bill broker any right to tell him, whether any of the other names on the bill are customers of the bank, or what security they have from any of them, or anything of the sort." See as to the law in this country Gilbert v. Marsh, 12 Hun.; Cory v. Leonard, 56 N. Y. 494, aff'g 1 S. C. (T. & C.), 183; Meehan v. Forrester, 52 N. Y. 277; Hazard v. Wells, 2 Abb. (N. C.) 444; Wood v. Sheehan, 68 N. Y. 365; Gray v. Green, 12 Hun. 598; N. Y. D. Reg. 1252; and in England, Newton v. Chorlton. 10 Ha. 646; Wade v. Cope, 2 Sim. 155; Pearl v. Deacon, 24 Beav. 186; *Ex parte* Overend, 20 L. T. N. S. 296.

In the case of *Taylor v. French*, recently decided by the Supreme Court of Tennessee, it was held that parol evidence is admissible as between the immediate parties to show that the indorser in blank of negotiable paper had, by agreement, varied the liability implied by law from the indorsement. COOPER, J., in deciding the point said: "The general rule that parol evidence is not admissible to contradict or vary the terms of a written instrument, applies to promissory notes, as has been repeatedly held by this court. Campbell v. Upshaw, 7 Humph. 185; Hancock v. Edwards, 7 Id. 349; Black-

more v. Wood, 3 Sneed, 470; Ellis v. Hamilton, 4 Id. 512. The rule also, perhaps, applies to regular indorsements as against a *bona fide* holder for value before maturity. And some courts have applied it even between the immediate parties. Lake v. Stetson, 13 Gray, 310, note. The tendency of recent decisions seems to be in that direction, upon the ground that the contract is as fully expressed by the simple indorsement as if written out in full over the signature. 1 Dan. Neg. Instr., § 717. The rule is clearly otherwise where indorsements are irregular, as, for example, where the indorser puts his name on the paper before the payee, or for the benefit of the payee. Ib. § 710; Rivers v. Thomas, 1 Lea 649. And many courts allow parol evidence in all cases of blank indorsements, because the right to demand and notice arises by implication of law, and may be waived directly or indirectly by conduct or circumstances. Dick v. Martin, 7 Humph. 263; Ross v. Espey, 66 Penn. St. 487; Davis v. Morgan, 64 N. C. 381; Johnson v. Martinus, 4 Halst. 144; Castrique v. Ballegreg, 10 Moore P. C. C. 94. The authorities are generally agreed that the statute of frauds has no application to contracts within the law merchant, or that an indorsement in blank is sufficient to satisfy the statute, the signature applying to the contract already written in the instrument indorsed, or to the words above the signature which are afterwards written by express or implied authority. 5 Dan. Neg. Instr., § 1765. This court has uniformly held that parol evidence is admissible between the immediate parties to show the real contract of the indorser, even in case of regular indorsements. Thus parol evidence has been declared admissible to show a waiver of demand and notice. 3 Humph. 17; 7 Ib. 263. So, to prove that the indorser guaranteed the payment of the note. Hall v. Rogers, 7 Humph. 536. And to show an absolute undertaking on the part of the indorser provided the proof was clearly and satisfactory. Newell v. Williams, 5 Sneed. 209. 'There is no question,' says Judge McKenney, 'but that an indorser in blank may, by his agreement, enlarge or vary the liability created by law. As in the case of an endorsement in full, it may be general and restrictive, qualified, conditional, or absolute. Nor is there any doubt as to the right of the holder to fill up the blank indorsement in conformity to the agreement of the parties; and such agreement is to be interpreted so as to carry into effect their true intention; neither is there any doubt that if the indorsement remain in blank, or only partially filled up, the holder may upon the trial show by parol evidence the nature and extent of the undertaking of the indorser.' Brockway v. Comparree, 11 Humph. 360."

THE DOCTRINE OF INDENTIFICATION OF PASSENGER WITH CARRIER IN ACTIONS OF TORT.

It has been a disputed question in England and in this country whether a passenger in a stage coach, railway train or other conveyance, who has been injured by the negligence of a third person, to which injury the negligence of the person managing the conveyance in which such passenger was riding at the time of the accident has contributed, can recover damages against such third person, or whether the very act of placing himself in the care of the driver or manager of the conveyance, does not establish such an intimate relation between them that, in case of accident, the negligence of the driver is to be considered the negligence of the passenger himself so far as his right of recovery for the injury is concerned.

The weight of authority in England seems to be that in such a case the negligence of the driver is as complete a bar to recovery as if it were the negligence of the passenger himself. On this side of the Atlantic, however, there still exists considerable difference of opinion in the courts of those States which have had occasion to take the subject under judicial cognizance.

The first English case is that of Vanderplant v. Miller, decided in 1828, and reported in 1 Mood. and Malk. 169. This was an action against the owners of a ship, which collided with the ship upon which were the plaintiffs' goods. The action was brought for damage done to the plaintiffs' goods. The defense set up was negligence in the management of the plaintiffs' vessel, in not having men on the look out. Lord Tenterden charged the jury, that "if there was want of care on both sides, the plaintiffs cannot maintain their action; to enable them to do so, the accident must be attributable entirely to the fault of the crew of the defendants." To the same effect is the case f Bridge v. Grand Junction Railway, de-

cided in 1838, and reported in 3 M. & W. 247. The case was not decided on its merits, owing to a defect in the pleadings, but the doctrine stated in the previous case was admitted by the judges in their opinions. Next came the cases of Thorogood v. Bryan, and Catlin v. Hills, reported consecutively in 8 C. B. 115 and 123. In Thorogood v. Bryan, the action was brought to recover damages for the death of a passenger in an omnibus, who was run over and killed while alighting, by the defendant's omnibus. In Catlin v. Hills, the plaintiff was a passenger on a Thames River steamer, and was injured by a collision with the defendant's steamer. The defence set up by both the defendants, was negligence on the part of those managing the plaintiff's conveyance; in the first case, for depositing the passenger a considerable distance from the sidewalk, and in the second, for improperly stowing the anchor, which was knocked down by the collision and fell upon the plaintiff's leg. The cases were argued the same day, but before judgment was given, the case of Catlin v. Hills was compromised. Separate opinions were delivered by the judges, of which the following are extracts. Coltman, J., said: "The case of Thorogood v. Bryan, seems distinctly to raise the question whether a passenger in an omnibus is to be considered so far identified with the owner, that negligence on the part of the owner or his servant is to be considered negligence of the passenger himself. As I understand the law upon the subject, it is this, that a party who sustains an injury from the careless or negligent driving of another, may maintain an action, unless he has himself been guilty of such negligence or want of due care as to have contributed or conduced to the injury. In the present case, the negligence that is relied on as an excuse is not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me that having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants, that if any injury results from their negligence, he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is traveling, that want of care on the part of the driver will be a defense of the driver of a carriage which directly caused the injury." Maule, J., said: "On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that can not with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom, by his servant, the driver, he employs to drive him. If he is dissatified with the mode of conveyance, he is not obliged to avail himself of it. According to the terms of his contract he unquestionably has a remedy for any negligence on the part of the person with whom he contracts for the journey. * * * But it seems strange to say, that, although the defendant would not, under the circumstances, be liable to the owner of the other omnibus for any damage done to his carriage, he still would be responsible for an injury to a passenger." The other judges delivered short opinions to the same effect.

The cases of Rigby v. Hewitt, and Greenland v. Chaplin, decided in 1850, and reported in 5 Exch. 239 and 243, and one or two other cases are sometimes cited as being contrary to the decision in Thorogood v. Bryan, and the preceding cases; but the decision in Thorogood v. Bryan, has been re-affirmed by the late case of Armstrong v. R. R., L. R. 10 Exch. 47. In this case, the plaintiff, one of the traveling inspectors of the carriage and wagon department of the L. & N. W. Railway Company, was traveling under a pass from them, in one of their carriages, on a journey from Leeds to Manchester. Near C. station, and on the line of the defendants' road over which the L & N. W. Railway Company had running powers, the train in which the plaintiff was traveling came in collision with a number of loaded wagons which were being shunted from a siding by the defendants, and he was injured. There was evidence of negligence on the part of the driver of the plaintiff's train in traveling at too great a speed, so as to be unable to stop when he came in sight of the danger signal which had been hoisted by the defendants. *Held*, approving the decision in Thorogood v. Bryan that the plaintiff was so far identified with the L. & N. W. Railway Company that he could not recover. These cases seem to establish pretty strongly the doctrine that mutual negligence of the driver

and a third person is a complete defence to an action brought by the passenger against such third person.

In this country, the courts are not in agreement. New York, New Jersey and Kentucky are strongly opposed to the rule laid down by the English courts, while decisions supporting that rule are cited from the reports of Massachusetts, Pennsylvania and Ohio.

To take up the latter cases first, the two following cases from Ohio are often cited as upholding the English doctrine. The Cleveland, Columbus and Cincinnati R. R. Co. v. Terry, 8 Ohio, St. 570, and Puterbaugh v. Reasor, 9 Id. 484. It is, however, difficult to see how the point in question is covered by these decisions. The first case seems to have no application at all in this connection, while in the second the point decided was this: That the owner of horse could not recover for his loss against a third person by whose negligence and the negligence of the plaintiff's agent the loss occurred, viz.: That the contributory negligence of the agent prevented recovery by the principal. This appears to have very little bearing on the principal question unless we assume at the outset that the very act of taking passage constitutes the driver the plaintiff's agent, an assumption which even the English cases have hesitated to make directly. Another case often cited as supporting the English rule is that of Smith v. Smith, 2 Pick. 621. Here the action was brought against the defendant by whose negligence the plaintiff's horse was injured. It was proved at the trial that the person who had hired the horse of the plaintiff, and was driving it at the time of the accident, contributed, by his negligence, to the injury, and for this reason it was held that the plaintiff could not recover. This case, like the preceding, does not seem to be strictly in point; and in both cases, besides, there is the element of bailment, which goes still further to destroy their analogy to the cases of Thorogood v. Bryan, etc. In Pennsylvania, in the case of Lockhart v. Lichtenthaler, 46 Penn. St. 151, the court follows in the wake of the English decisions, not basing their decision, however, upon the same ground, viz.: the identification of the passenger with his own vehicle, but upon the broader ground of public policy * * * "it better accords with the policy of the law to hold the carrier alone responsible in such circumstances, as an incentive to care and diligence."

The following cases are to the contrary effect: In Chapman v. New Haven R. Co., 19 N. Y. 341, in which case the accident was caused by a collision of two trains, it was held that the negligence of the carrying train did not bar a recovery by the person carried. In Colegrove v. New York and New Haven R. Co., 20 N. Y. 492; s. c. 6 Duer. 382, it was held under the same circumstances, that the passenger could maintain a joint action against both companies. The same decision was reached in Barrett v. Third Ave. R. Co., in which case the colliding vehicles were horse cars; the court holding that both companies were liable jointly or severally. In the case of Robinson v. N. Y. & C. R. Co., 66 N. Y. 11, it was held that a female who accepts an invitation to take a ride with a person in every way competent and fit to manage a horse, is not chargeable with his negligence; and contributory negligence on his part is no defense to an action against a railroad corporation for injuries resulting from a collision. In New Jersey the New York doctrine is followed in Bennett v. N. J. R. & T. Co., 36 N. J. 225. In this case the plaintiff was a passenger in a horse car, and was injured by a collision with a locomotive. There was evidence of negligence on both sides. It was held that this did not disentitle the plaintiff to recover. To the same effect is the case of the Danville, Lancaster & Nicholsonville Turnpike Co. v. Stewart, 2 Met. (Ky.) 119. This case decides that, though the driver of a coach, a passenger in which was injured by a collision between the coach and a turnpike gate, may have been somewhat negligent in not lighting his lamps, this furnishes no excuse to the turnpike company for failing to keep the gate securely fastened back. If the injury had resulted wholly from his negligence, the company would not be liable; but if the injury were occasioned by the negligence of both, both in that case are liable to the party injured.

It will be seen from an examination of the cases decided in this country, that those cited as supporting the English rule, with one exception, are not entirely applicable, while the case forming the one exception, that of Lockhart v. Lichtenthaler, *supra*, bases its decision upon a different ground than that of identity, as laid down in Thorogood v. Bryan. What

precise meaning the word "identity" in this connection bears, is somewhat difficult to understand. It means, of course, that such a close relationship is established between the driver and the passenger that the latter's right to recover for an injury caused by the joint negligence of the former, and that of a third person, is identical with the driver's right of recovery; but what this relationship is, is a point that is not very clearly determined by those courts which follow the doctrine of Thorogood v. Bryan. The only relationship, however, that can exist between the two is that of master and servant, or principal and agent. But how can it be said that the driver of a coach, or the manager of a train of cars, or other conveyance, is the servant or agent of the passenger, in that coach or conveyance. The passenger has no power to change the line of travel, or the point of destination; nor can he exercise the right of master over servant by sending him upon another journey. But if, however, the driver or conductor is the agent of one passenger, he is equally the agent of all, and subject to the different commands and directions of all the passengers. And, if he is the agent of all the passengers, so that negligence on his part is a bar to their recovery, it must also follow that negligence on his part subjects each passenger to an action for any injury caused by such negligence. For it can not be consistent with the broad principles of the law that this agency is created for one purpose only, and does not exist for all; that it exists when the right of the passenger to recover is concerned, but not when the question of his liability for the negligence of his driver arises. We can not so divide the relationship as to call it into existence at one moment, and deny that existence the next. If, then, we follow the rule as laid down in Thorogood v. Bryan, we are logically brought to hold each passenger responsible for the negligence and careless acts of his driver, or the person in charge of the conveyance in which he is riding, which is a manifest absurdity.

In the case of Lockhart v. Lichtenthaler, *supra*, the reason for the decision was that it was in accordance with public policy to hold the carrier alone responsible as a preventive against negligence and carelessness, but why he carrier would be more likely to use due care when responsible to his own passengers alone, than when he is jointly and severally liable with some third person, it is somewhat difficult to see. The very fact that he was responsible to passengers in other vehicles, as well as those in his own, would seem to be still more of an "incentive to care and diligence" on his part.

In closing we quote a few words from the editor of Smith's Leading Cases, Vol. I, p. 220: "If two drunken stage coachmen were to drive their respective carriages against each other, and injure the passengers, each would have to bear the injury to his carriage, no doubt; but it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachman who drove them so as to be restricted for remedy to actions against their own driver, or his employer. This, nevertheless, appears to be the result of the decision in Thorogood v. Bryan. * * * Why, in this particular case, both the wrong doers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to deserve more consideration than it received in Thorogood v. Bryan."* J. A. T.

[* See, also, on the point discussed in this article, the recent case of Prideaux v. City of Mineral Point, 6 Cent. L. J. 429.—ED. CENT. L. J.]

TAXATION OF MUNICIPAL BONDS HELD IN ONE STATE AND OWNED IN ANOTHER.

STATE v. HOWARD COUNTY COURT.

Supreme Court of Missouri, April Term, 1879.

[Filed June 2, 1879.]

The actual *situs* of personal property, and not the domicil of its owner, must determine the State in which it may be taxed. Municipal bonds of counties, like other commercial securities, are property in the place where they are found, and taxable there, and the owner of such bonds who has sent them out of this State into another in good faith, can not be taxed on such bonds in this State, although he may have his domicil in this State.

Appeal from the Circuit Court of Howard county:

NAPTON, J., delivered the opinion of the court:

Upon a *certiorari* issued at the instance of W. F. Dunnica, requiring certain proceedings by the board of equalization and the county court, to be sent up to the circuit court for review, it appeared

that the Assessor of Howard county notified the board of equalization that Dunnica had falsely and fraudulently refused to give a correct list of his personal property. In the investigation of this charge, the board found that Dunnica had twenty-two bonds of Howard county, of one thousand dollars each, and prior to such assessment had sent them to New York; that they were taxable in Howard county, and therefore raised his taxable property $17,500, and by way of penalty for furnishing such false list, trebled this sum, and ordered him to be taxed for $52,500 00. The county court sustained this act of the board. In the circuit court, on the return of the *certiorari*, it appeared that Dunnica testified before the board as follows: That prior to the passage of the revenue act of 1872, he sent twenty-two Howard county bonds belonging to his wife, of the value of $17,600, to the city of New York, to the Safe Deposit Company, being the bonds aforesaid, which company kept a safe for the purpose of safely keeping bonds of this character, payable to bearer; that he paid one dollar per thousand for such safe keeping; that said bonds were in New York on August 1st, 1875; that they were not sent out of this State to avoid taxation, but for safety; that he made no effort to conceal the fact that his wife held the bonds; that he had consulted c unsel, and was advised by such counsel that said bonds were not taxable or subject to taxation in the State of Missouri; that he did not believe the bonds were taxable by law in this State, and that he had taken the oath required by law; that he had sent no property out of this State to avoid taxation. The relator states that said board of equalization, without hearing other evidence than that of relator, proceeded to add to the assessment list of relator the bonds found by them and shown by relator to have been in the State of New York on the 1st day of August, 1875, placing said valuation at the sum of $17,500. The circuit court quashed the *certiorari*, thereby sustaining the action of the county court and the board of equalization.

It will be seen that the only question involved is whether these municipal bonds were taxable in Howard county, the domicil of the owner, though sent to New York for *bona fide* purposes, three years before the assessment.

Mr. Justice Field observes, in 15 Wall. 323, that "it is undoubtedly true that the actual *situs* of personal property, which has a visible and tangible existence, and not the domicil of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds, and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as property in the place they are found, though removed from the domicil of the owner, the latter are treated and pass as money wherever they are."

In this State, the opinions have been decided in conformity to this position, and, indeed, have gone beyond it, extending the doctrine to ordinary bonds and stocks. In State on Petition of Taylor v. St. Louis Co. Court, 47 Mo. 599, the doctrine is applied to bonds and notes and stocks of every description. In St. Louis v. Wiggins Ferry Co., 40 Mo. 58, the same doctrine is sustained. The property of either a resident or non-resident is taxable here, if it be found situate within the local jurisdiction, whether it be within the hands of the owner himself or of his agents. It is conceded that they can not be assessed in both States, the *situs* of the bonds and the domicil of the owner, though an erroneous assessment in one will not exempt them from a correct assessment in the other.

Our statute of 1872, adopted since the decision above referred to, seems to us to concede its propriety. The 31st section, 2 Wag. Stat. 1164, requires the following oath to be taken by the citizen assessed: "I do solemnly swear or affirm that the foregoing list contains a true and correct list of all the personal property made taxable by the law of the State of Missouri, including therein money and notes or bonds, *on hand or on deposit*, owned by me, or under my charge or management, etc , and *that I have not sent or taken any property, bills, bonds or notes, or other securities out of this State to avoid taxation*, so help me God." Does not this oath necessarily imply that where such property has been sent out of the State, for *bona fide* purposes, and not to avoid taxation, it is exempt? Why require the oath, if it is equally subject to taxation, whether sent out of the State in good faith or not? Our legislature seems to have been of opinion that the adoption of the rule decided in Taylor v. St. Louis, 47 Mo. 599, would not operate injuriously on the revenue, believing, doubtless, that the property of capitalists in this State, whose domicil was abroad, would greatly exceed that of our citizens, the *situs* of which was in good faith in other States. Nor were they impressed with the justice of declaring property taxable here, which was properly taxable elsewhere. That such is the English rule, is apparent from the leading case of Attorney-General v. Hope, 1 Cr. M. & R. 530; and Attorney-General v. Dimond, 1 Cr. & Jar. 370.

In conformity, then, to the decisions in this State, and, indeed, to the fair deductions from the revenue law itself, it is obvious that the judgment of the circuit court was erroneous. It is therefore reversed. The other judges concur.

MORTGAGE—POWER OF STATE COURT TO DECLARE VOID ERRONEOUS PROCEDURE OF FEDERAL COURT IN DEROGATION OF STATE LAW.

SNITTERLIN v. CONNECTICUT MUTUAL LIFE INS. CO.

Supreme Court of Illinois.

[Filed at Ottawa, February 22, 1879.]

Although a decree of the United States Circuit Court for the Northern District of Illinois upon a bill filed to foreclose a mortgage, for the sale of the mortgaged premises, without granting to the mortgagor

the right of redemption of the property within one year, as given by the statutes of the State of Illinois, is erroneous and void, yet where no appeal is taken therefrom within the allowed time, the courts of the State of Illinois have no power upon bill filed by the mortgagor to set aside the sale and allow redemption.

On the 11th day of July, 1874, the Connecticut Mutual Life Insurance Company filed its bill of complaint in the Circuit Court of the United States for the Northern District of Illinois against Jacob E. Snitterlin and others, to foreclose two mortgages upon certain premises, which had been executed by Snitterlin to the company, the bill explicitly praying for a foreclosure "according to the rules and practice of said court."

On the 8th day of March, 1875, a decree was entered in the cause, finding the amount due upon the mortgages and directing the same to be paid within one hundred days, and that in default of such payment the master in chancery of said court sell the mortgaged premises at public auction and "according to the course and practice" of said United States Circuit Court, which was, from its organization down to May, 1878, to make such sales absolute and not subject to redemption. The master in accordance with the decree advertised the premises for sale at public auction, and sold the same on May 10th, 1876, to the Connecticut Mutual Life Insurance Company, it being the highest bidder. On May 31, 1876, there was an order of confirmation of the master's report of sale and directing the master to execute to the insurance company, the purchaser, a deed for the premises, and further directing that the mortgagor be forever barred and foreclosed of and from all right and equity of redemption in and to the premises, and that the purchaser be let into possession. In addition a money decree for over $6,000 for deficiency was rendered against Snitterlin. The master, on June 16, 1876, in pursuance of the order of the court, executed to the company a deed of conveyance of the mortgaged premises.

On the 20th day of June, 1878, Snitterlin filed his bill in chancery in the Circuit Court of Cook County to redeem from the mortgagees, charging that the rules and practice of the Circuit Court for the Northern District of Illinois were to make such foreclosure sales absolute and not subject to redemption, and claiming that the decree of the United States Circuit Court so far as it ordered the sale to be made in accordance with the course and practice of said court, that is, without redemption, was contrary to the statute of the State of Illinois, allowing a right of redemption upon such sales, and void; that the court had no power or jurisdiction to direct a sale in that manner; that the sale was void and the deed issued thereon a cloud upon complainant's title; that so far as the decree was lawful, it had never been executed, and that the mortgagor, the complainant, was entitled to make payment and relieve the premises of the lien thereof, which he offered to do.

To this bill the Connecticut Mutual Life Insurance Company pleaded in bar the record of the United States Circuit Court in the foreclosure proceeding and the deed issued thereunder, and section 1008 of the Revised Statutes of the United States limiting the time for appeals and writs of error in the United States courts to two years; that more than two years had elapsed since the decree and that no writ of error had been brought or appeal taken, or bill of review filed. This plea having been set down for argument was held by the circuit court *pro forma* to be good and sufficient, and the bill was accordingly dismissed for want of equity. The cause having been taken to the Appellate Court of this State for the Fourth District by writ of error, the decree of the Circuit Court of Cook County was affirmed, and the complainant has appealed to this court.

The statute of this State at the time of the foreclosure proceeding, as also when the mortgages were executed and ever since, gave in a foreclosure case a right of redemption after the foreclosure sale, during the period of one year to the debtor and of fifteen months to a judgment creditor, by paying the amount of the bid with ten per cent. per annum interest, and directed that the officer making the sale, instead of executing a deed, should give the purchaser a certificate of the sale, stating among other things the time when the purchaser would be entitled to a deed if the premises were not redeemed. By the recent decision of the Supreme Court of the United States in the case of Brine v. Hartford Fire Insurance Co., 7 Cent. L. J. 181, it was held that a like decree of the Circuit Court of the United States for the Northern District of Illinois in a foreclosure case where the master in chancery was ordered to sell the land for cash, making such sale in accordance with the course and practice of the court, was erroneous; it being admitted in the case that it was according to the course and practice of the court that the master makes at the sale a deed, which by the uniform practice of the court gives him the right to immediate possession and cuts off all right of redemption statutory or otherwise. The ground of reversal was the conflict of the decree with the statutes of Illinois allowing redemption; that where foreclosure proceedings are regular, the decree, the sale made under it, and the deed made on the sale, would constitute a transfer of real estate from one person to another, and that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated; and that the State statutes of redemption are of such a character that they create a rule of property entering into the contract of mortgage, and are obligatory in all courts which assume to give remedy on such contracts.

It is not questioned that under the decision in the Brine case, the decree of the United States Circuit Court now under consideration was erroneous. The position taken by the appellee is that the decree was but erroneous and so good until reversed in some way, and that it and the proceedings under it can not be collaterally questioned; that proceedings for such reversal must be taken within the time allowed by law, and that time having elapsed the decree and the execution of it can no longer be drawn in question.

The general doctrine upon this subject is admitted on both sides, that if the court rendering the decree "had cognizance of the cause, the judgment is only erroneous; but if the court had no jurisdiction it is void." Buller N. P. 66, and see Bockmaster v. Carlin, 3 Scam. 106; Voorhees v. Bank of United States, 10 Pet. 449.

But this doctrine, appellant contends, is subject to qalifications in its application as recognized in Bigelow v. Forest, 9 Wall. 351; *Ex parte* Lange, 13 Wall. 163, and Windsor v. McVeigh, 93 U. S. 274, 4 Cent. L. J. 61, it being observed in the latter case that the statement of the doctrine in Cornell v. Williams, 20 Wall. 250, is more accurate: "The jurisdiction having attached in the case, everything done within the power of that jurisdiction when collaterally questioned is held conclusive of the right of the parties, unless impeached for fraud," and it is claimed that here the court had no power to pronounce a decree repugnant to the statute of the State of Illinois, and that, in doing so, it transcended its jurisdiction, and the decree was void. On the other hand, it is claimed that the just qualification of the doctrine is only that the judgment or decree must be within the *general powers* of the court; that when a court has once acquired jurisdiction in a cause, no subsequent proceeding can be void which is within the *general powers* of the court, and that the proceedings here questioned were within the general powers of the court.

Without attempting to pass upon the question whether the decree of the United States court, in so far as it ordered an absolute sale of the mortgaged premises, without allowing the statutory right of redemption, was in excess of its jurisdiction and void, so that the mortgagee, notwithstanding the decree and the master's deed, might, within the year allowed him by the statute for redemption, have paid or tendered the redemption money, and redeemed the land, or have been entitled to file a bill for redemption, we will assume, for the purpose of the present decision, that that portion of the decree excluding redemption was void, and it is not then apparent that this bill can be maintained. Such portion of the decree being held void, need not invalidate the residue of the decree, and make null all the subsequent proceedings in execution of the decree.

In Bigelow v. Forest, 9 Wall. 351, an ejectment suit, it was held that a judgment, in a confiscation case, condemning the fee of the property, was void for the remainder after the termination of the life estate of the owner. To the objection that the decree was conclusive, Mr. Justice Strong, speaking the opinion of the court, said: "Doubtless, a decree of a court having jurisdiction to make the decree can not be impeached collaterally, but under the act of Congress, the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forest (the owner). Had it done so, it would have transcended its jurisdiction." In Day v. Micou, 18 Wall. 156, it was said that, in Bigelow v. Forest, "we also determined that nothing more was within the jurisdiction or judicial power of the district court (than the life estate) and that, consequently, a decree condemning the fee would have no greater effect than to subject the life estate to sale." In *Ex parte* Lange, 18 Wall. 163, Lange had been convicted, under an act of Congress, for appropriating to his own use mail bags. The punishment for the offense, as provided in the statute, was imprisonment for not more than one year, or a fine of not less than ten dollars nor more than two hundred dollars. The judge presiding sentenced the prisoner to one year's imprisonment, and to pay two hundred dollars fine. The prisoner was, on the third day of the month, committed to jail in execution of the sentence, and on the following day the fine was paid. On the 8th of the same month an order was issued vacating the former judgment, and the prisoner was again sentenced to one year's imprisonment from that date. The prisoner being brought before the Supreme Court of the United States on a writ of *habeas corpus*, that court said, in reference to the first judgment:

"The judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offense as a valid verdict. The error of the court in imposing the two punishments mentioned in the statute, when it had only the alternative of one of them did not make the judgment wholly void. Miller v. Finkle, 1 Parker Crim. Rep. 374, is directly in point. But we think no one will contend that the first sentence was so absolutely void that an action could be maintained against the marshal for trespass in holding the prisoner under it."

Although the judgments there were in part equally repugnant to the statute and beyond the power of the court, as the decree in the present case without redemption, it was recognized in the one case and held in the other, that the judgments were not entirely void; it being recognized in the first case that the decree condemning the fee might have the effect to subject the life estate to sale.

The decree here finding the amount due was good and also the order of sale if the amount was not paid within a hundred days; the defect was in adding to the order of sale that it should be without redemption.

Hold that additional portion of the order of sale to be void, and then it is null, if as it were not, and the simple order of sale stands which has been executed and deed given. The statute gave to the mortgagee the right of redemption and he might have exercised it. It is not the decree that gives the right to redeem; the mortgagee does not depend upon that for the right, but upon the statute. We apprehend that on a decree of foreclosure a mere order of sale would be sufficient, saying nothing about redemption; that the right of redemption would not be interfered with under such an order but would exist in full force by virtue of the statute, and that it would be the duty of the officer in the execution of the order of sale to follow the directions of the statute. But suppose he should not do so and upon the sale made, instead of giving a certificate of the sale, and that the

purchaser would be entitled to a deed at the end of fifteen months if the premises should not be redeemed as the statute directs, he should do, as was done in the present case, execute a deed at once. We think that would not defeat redemption, nor give a right of precedent possession, at least in equity, but that the statute would control, and the right of redemption and of present possession remain by virtue of the statute; and that the deed would remain inoperative in effect until the expiration of the period for redemption. The decree here has been executed, the sale made, and deed given. The wrongful circumstance was the making of the deed at the time of the sale, instead of deferring its execution until fifteen months afterwards. The deed was prematurely made; but if it be held as not affecting any right of the debtor in consequence thereof, why may it not stand and remain as an operative deed, after the period of redemption, when no attempt had been made to assert the right of redemption?

It is not perceived what legal harm can have resulted to appellant from the decree being in its present form, instead of with redemption.

If erroneous only in so far as it did not allow the statutory right of redemption, then, in the settled rule, it could not be questioned collaterally. If void, then we do not regard that it was an obstruction to the exercise of the right of redemption given by the statute, and it is only as affecting the exercise of such right of redemption that there can be substantial cause of complaint. As affecting the sale of the premises, it would seem that one, without redemption, would be calculated to insure a better price for the property sold than a sale subject to redemption. Had all been in regular form, and a certificate of purchase only given on the sale, the purchaser would have now been entitled to a deed, there having been no effort for the exercise of the right of redemption. Now, having the deed, notwithstanding it was prematurely executed, we think the purchaser may hold it, there not appearing to be any equitable ground for the interposition of a court of equity to set it aside and allow redemption now. We are of opinion that there is no equitable title to relief, and hence that the circuit court did right in holding the plea good and dismissing the bill. Judgment affirmed.

NEGOTIABLE PAPER — ALTERATION—RECOVERY.

KNOXVILLE NAT. BANK v. CLARK.

Supreme Court of Iowa, June, 1879.

A negotiable note for ten dollars was executed and delivered with blanks preceding the amount, and blank as to place of payment. Afterwards, the words and figures were changed by some one so as to make it read for one hundred and ten dollars. A place of payment was also inserted. There was nothing about the appearance of the note to excite suspicion, and it was taken by plaintiff after alteration, before maturity, for a valuable consideration, and without notice of such alteration. *Held*, that no recovery could be had thereon.

Appeal from Marion District Court.

The facts in the foregoing actions being identical, they have been submitted on the abstract in the first case. The plaintiff seeks to recover on a negotiable promissory note, executed by the defendant, which was assigned to the plaintiff before maturity. The defendant alleged the note had been altered after its execution. There was a trial by the court. Judgment for the plaintiff, and defendant appeals.

Stone & Ayres, for appellant; *Anderson & Briggs*, for appellee.

SEEVERS, J., delivered the opinion of the court:

When the note was presented to the defendant and executed by him, it contained blank spaces, and was as follows:

$10.00. FRANKLIN, March 16, 1877.

Six months after date I promise to pay to the order of C. H. Huff———ten dollars, at the——— Bank of———value received with interest at ten per cent. per annum.

———Witness. JOHN CLARK.

When the note was assigned to the plaintiff it was in all respects like the foregoing, except that "one hundred and" had been written before "ten," and the figure 1 written after the dollar mark, so that it appeared to be a note for $110. The words "Knoxville National," had been written in the blank which preceded "bank," and "Knoxville, Iowa" in the blank following the word "of." The bank had no knowledge of these alterations, and there was nothing on the face of the note tending to show them. It was assigned to the bank by a person purporting to be the payee thereof. About a year previous to this transaction, the plaintiff had purchased negotiable paper of C. H. Huff, executed by the citizens of Marion county, which had been paid without question. Before signing the note, the defendant asked the persons to whom it was delivered why they did not fill up the blanks so as to make it payable at one of the Knoxville banks. The reply was, they did not wish to do so, because an agent of the payee would come around and collect the note when it became due. The sole question is whether, under the facts above stated, the plaintiff is entitled to recover.

There is a class of cases holding that the payee has authority to fill a blank in a promissory note, left for the purpose of designating the place of payment. Redlich v. Doll, 54 N. Y. 234. And there is another class which holds where a negotiable promissory note is entrusted to another, for use, that there exists an implied authority to fill blanks therein. In the note in the present case the blank for the amount was partly filled, and the serious question is, whether the maker is responsible for an unauthorized alteration or addition thereto. As to this question there is a conflict in the authorities. The case of Young v. Grote, 4 Bing. 253, was decided in England in 1827. The facts were that plaintiff signed some blank checks and left them with his wife, with directions to have them filled up as his business might require

during his absence. Mrs. Young delivered one of the checks to her husband's clerk, and directed him to fill it up for fifty pounds and some shillings. This he did in her presence, and she desired him to get it cashed. Before doing so the clerk, without authority, altered the check by writing "three hundred and" before "fifty," so that the check, on its face, was for three hundred and fifty pounds and some shillings, and such amount was paid by the banker. The action was between him and Young, his customer. It was held the latter was liable for the amount so paid, on the ground that the plaintiff had been negligent in so drawing the check, as to allow the alterations to be made without discovery. It is not too strong an expression to say that this decision has been doubted and shaken as an authority by more than one subsequent decision of the English courts. Especially is this so as to the ground upon which the ruling is based. The most recent case to our knowledge is that of Baxendale v. Bennett, decided by the English Court of Appeal and reported 7 Cent. L. J. 347. The facts were that the defendant at the request of Holmes accepted a draft as an accommodation bill at a time when a drawer's name was not signed thereto, and sent it to Holmes, who, however, returned it to the defendant. At this time it had no drawer's name thereto. The defendant put it in an unlocked desk in his chambers, from whence it was taken by some unknown person, and came into the hands of the plaintiff as a *bona fide* holder for value. At this time the name of one Cartwright was signed to the draft as drawer. The lower court found the bill had been stolen and was a forgery, but was of the opinion, the defendant had, by his negligence, led to the bill being put into circulation, and as the plaintiff was an indorsee for value, he was entitled to recover. But on appeal it was held otherwise, and that the negligence of the defendant would not justify a recovery. The case is in direct conflict with Young v. Grote, as to the question of negligence, and it was said the lastnamed case must be regarded as shaken as authority, by what is said in Bank of Ireland v. Evans' Charity Trustees, 5 H. L. Cases, 389.

The case of Worrall v. Gheen, 39 Pa. St. 388, is identical with the case at bar, except as hereafter indicated. "The fraud was so well executed that the appearance of the note was not such as to excite the suspicion of a man in ordinary business. *On inspection a difference in the color of the ink with which the words 'one hundred and' were written, may be perceived.*" The italics are ours, and indicate the only distinction between the two cases. This, however, is a distinction without a difference, because the alteration was not such as to excite the suspicion of a man of ordinary business capacity. Such distinction is not alluded to by the court. Young v. Grote, however, is, and it is doubted. The fact there was a partly filled blank in which the additional amount could be written, was held to make no difference, and it was said: "This fact shows carelessness, but it was not the carelessness of the indorser, but the forgery of the maker, that was the approximate cause that misled the holder." There is do material difference in the facts between the case just cited and Garrard v. Haddan, 67 Pa. St. 82. In this case, Young v. Grote is followed, and Worrall v. Gheen distinguished, because it was a case of "perceptible alteration," and yet as we have said the ruling was not placed on the latter ground by the judges, who at that time composed the court. Zimmerman v. Rote, 75 Pa. St. 188, and Brown v. Reed, 79 Id. 370, are substantially alike. In one case the alteration consisted in cutting off a separate agreement written on one end of the paper on which the note was written, and in the other the paper on which the maker supposed an agreement was written, was so divided by cutting as to leave a negotiable promissory note. There was a recovery in both cases. They are not identical with the case at bar, and we are not prepared to say they may not be sustained upon some principle not applicable to it.

The facts in Cornell v. Nebeker, 58 Ind. 425, are like those in Zimmerman v. Rote, and the decision is based thereon. No independent reasons are given, except that "public policy demands such a line of judicial decision as will tend to give confidence" in negotiable paper, "by securing the rights of the *bona fide* holder." Harvey v. Smith, 55 Ill. 224, is based on Young v. Grote. Leach v. Nichols, Id. 274, and Subel v. Vaughan, 79 Ill. 257, are not applicable. In Yocum v. Smith, 63 Ill. 321, the plaintiff notified the defendant of the amount of the altered note when it became due. He made no objection thereto until a suit was threatened some time afterwards. The case may possibly be supported on the ground of a ratification. It is true it is not so placed. Neither the facts nor the points determined in Capital Bank v. Armstrong, 62 Mo. 59, and Iron Mountain Bank v. Murdock, Id. 70, 3 Cent. L. J. 251, are such as to make them authorities in the case at bar. In Vishser v. Webster, 8 Cal. 109, the note when executed was complete in all respects, except a blank for the rate of interest. This was afterwards filled. All the court say is that "to fill a blank in a note is not an alteration." In Joseph v. National Bank, 17 Kas. 256, the note, when indorsed, contained a blank for the amount. It was agreed this should be filled with $400. Instead of this $800 was written therein. This was a mere excess of authority. We have alluded to the principal authorities, cited by counsel for the appellee, except two or more decisions of this court, which will be referred to hereafter. On the other hand, Wade v. Withington, 1 Allen, 561, and Greenfield Savings Bank v. Stowell, 123 Mass. 196, are on all fours with the case at bar, and it was there held the alteration rendered the notes void. The same ruling on the same state of facts was made in Holmes v. Trumper, 22 Mich. 427. See, also, Bradley v. Mann, 37 Mich. 1. In principle there is no distinction between the foregoing and Bruce v. Westcott, 3 Barb. 374. It was held in Woodworth v. Bank of America, 19 Johns. 391, that the addition of words designating a place of payment discharged an indorser. We infer, however, the addition was written on the margin of the note, and not in an unfilled or partly filled blank.

The same ruling was made in Nazro v. Fuller, 24 Wend. 374. In this case the additional words were written at the end of the note as it was when executed. The distinction between this case and Redlich v. Doll, before cited, is caused by the character of the blank. In the latter case the word "at" immediately preceded the blank. The note in McGrath v. Clark, 56 N. Y. 34, had a similar blank to that in Redlich v. Doll. Not only was a place of payment written therein, but the words "with interest" added thereto. It was held the addition of the last words rendered the note void.

In Goodman v. Eastman, 4 N. H. 455, Eastman signed the note as surety for Harford—the amount of the note being $20. Before it was delivered to the payee, Harford so altered it that it became a note for $120. It was held Eastman was not liable. Here the payee was an innocent holder for value. In Watterman v. Vose, 43 Maine, 504, the alteration was made by the maker, with the knowledge of the indorsee, before the transfer. The surety was discharged. The knowledge of the indorsee was not referred to in the opinion.

In Steele v. Wood, 6 Wall. 80, the note when executed, contained "September" without more as its date. This was stricken out, and "October 11" inserted. The alteration was apparent on the face of the note. Swayne, J., states the points to be decided as follows: "The state of the case relieves us from the necessity of considering upon whom rested the burden of proof; the nature of the presumption arising from the alteration apparent on the face of the paper, and whether the insertion of a day in a blank, left after the month, exonerates the maker who has not assented to it." It was held there could not be a recovery on the note. In Angle v. Ins. Co. 92 U. S. 330, 3 Cent. L. J. 229, Clifford, J., says, "that where a party to a negotiable instrument intrusted it to another for use as such, with blanks not filled up," there exists an implied authority to fill up the blanks, but that such authority "would not authorize the person intrusted with the instrument to vary or alter the material terms of the instrument by erasing what was written or printed as part of the same, nor to pervert the scope and meaning of the same by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument before it was delivered."

It is insisted by the appellee that this court, in Trustees v. Hill, 12 Iowa, 462; McDonald v. Muscatine Nat. Bank, 27 Id. 319, and Rainbolt v. Eddy, 34 Id. 440, has determined the question under consideration in accord with the ruling below. In the first case authority was given to fill the blank left for the amount. A greater sum than had been agreed was inserted. This was a mere excess of authority. In the second case the court found the blank instrument had been delivered for some purpose, and that the filling the blank so as to make a promissory note, was a gross fraud. The maker was held liable. The court negatively, at least, concluded a forgery had not been committed. The case, therefore, is not authority in the case at bar, as it is agreed on all hands, the alteration in the present case was a forgery. In this last case "ten per cent. interest" was "written in a blank left in the note when executed." This case may possibly be supported on the ground that there existed an implied authority to fill the blank, or on the ground it is put in the opinion. It is there said: "Since the defendant, by executing a note and delivering it with a blank in it, for the insertion of the interest, and thereby placing it in the power of the payee to do a wrong, as between him and the plaintiff, a *bona fide* purchaser for value, he ought to suffer the loss therefrom." This case can not be regarded as authority in the case at bar, because in that case the blank was wholly unfilled. The question under consideration must be regarded as an open one in this State. The authorities cited by the appellee, and the whole doctrine on that side, rest on Young v. Grote as its foundation stone. Ever since that decision has been made, there has been an apparent struggle to find some solid foundation upon which it could rest. In casting about for some principle on which it could be based, several have at various times been suggested. They are:

1. That the plaintiff owed a duty to his banker, and their peculiar relations justified the court in sustaining the payment made by the banker.

2. The fact that the check was written by the plaintiff's clerk, and intrusted to him to draw the money, and by whom the alteration was made, justified the decision. We are not called upon to either affirm or deny the sufficiency of either of the foregoing reasons.

3. That the plaintiff was estopped from showing the truth. But this has been exploded in both England and this country. The plaintiff had not done or omitted to do anything upon which an estoppel could be based, unless he owed a duty to his banker, and that is not applicable to the case at bar. Besides what has been said, it may be remarked, the decision was not placed on the ground the plaintiff was estopped.

4. Negligence of the drawer of the check in leaving a blank partly filled. On this ground the court proceeded, and the decision is based on the reasoning of the civil lawyers. But could it be anticipated that such negligence would cause another to commit a crime, and can it be said a person is negligent who does not anticipate and provide against a thousand ways through or by which crime is committed? Is it not requiring of the ordinary business man more diligence than can be maintained on principle or is practicable, if he is required to so protect and guard his business transaction, that he can not be held liable for the criminal acts of another? If so, why should not the negligence of the owner of goods which are stolen excuse the *bona fide* purchaser? Can it be fairly said that the negligence of the drawer of the check or maker of the note, was the proximate cause of loss to the holder? It seems to us, the proximate cause of the loss is the forgery, and this the maker had no reason to anticipate.

5. In some of the cases following Young v. Grote, the rule has been invoked, that where one of two innocent persons must suffer by the wrongful act of another, he must suffer who placed it in

power of such third person to do the wrong. It occurs to us, such rule can have no application to this class of cases. It has never, we think, been carried to the extent of making one person civilly liable for the crime of another, and on principle, we think, it can not be. As far as courts have gone in this direction, is to make one person civilly liable for the fraudulent acts of another, whereby some third person has sustained a loss—the fraud being made possible by the acts and conduct or negligence of the person charged. Douglass v. Matting, 29 Iowa, 428, is of this character.

Lastly, it has been said the free interchange of negotiable paper requires the establishment of the rule adopted by the court below. At the present day negotiable paper is not ordinarily freely received from unknown persons. Forgeries, however, are not confined to such. But the necessities of trade and commerce do not require the law to be so construed as to compel a person to perform a contract he never made, and which it is proposed to fasten on him, because some one has committed a forgery or other crime. It should be borne in mind that much negotiable paper is executed by parties who have not in any just sense ordinary business capacity. Relying on this fact, advantages are taken which courts are asked to sustain, because of the rules long established for the protection of good faith holders of negotiable paper. We can but think courts have gone as far in this direction as can be safely done. We are not prepared to say any steps backward should be taken, but no such advance should be taken as to validate such paper as that in the case at bar. The interests of legitimate trade do not require that this should be done.

Believing the weight of modern authority is opposed to the rule adopted by the district court, and that upon principle it can not be sustained, the judgment must be reversed.

ADMINISTRATION — CONFLICT OF LAWS.

DENNY v. FAULKNER.

Supreme Court of Kansas.

1. APPEAL—PRACTICE—EXCEPTIONS. — Where a case was tried at one term before a jury, verdict returned and a motion for a new trial duly filed, and such motion was continued to a subsequent term and then upon hearing overruled and time given in which to make a case: *Held*, that the exceptions to the proceedings on the trial, though first reduced to writing at the time of making the case, and after the close of the trial term, were in time, and must be considered in this court.

2. A BILL OF SALE EXECUTED IN ILLINOIS upon personal property situated in Nebraska, is valid *inter partes*, though intended only as security for advances, and though neither filed nor recorded in Illinois or Nebraska, and though the possession of the property was not delivered.

3. AN ADMINISTRATRIX OF THE VENDOR in such a bill of sale has no greater rights in said property than her intestate, and can make no other defenses than he against such bill of sale.

4. WHERE F DOMICILED IN NEBRASKA dies leaving personal property in Kansas, and administration is duly taken out at the place of his domicil, and the administratrix so appointed takes peaceable possession of such property in Kansas, and there is no opposing administration in this State, and no local creditors: *Hald*, that the courts of this State will *ex comitate* recognize her possession as rightful and protect it as fully as though she had taken out letters of administration in this State.

5. WHERE A SHERIFF OF ONE OF THE COUNTIES of Nebraska with process issued by a Nebraska court, comes into this State and levies upon personal property within the limits of this State, such levy is absolutely void, and confers no title or right of possession upon such sheriff. But where such sheriff with such process levies upon property within the limits of his jurisdiction, he establishes a title and right of possession which will be recognized and protected in the courts of this State, although while holding such possession he temporarily moves such property into this State, and while in this State it is seized upon process issued out of a court in this State.

6. WHILE IT IS A GENERAL PROPOSITION that as to contracts concerning personal property, the *lex loci contractus* governs; or, in other words, that whatever goes to the form, manner of execution, and all other matters affecting the validity of the instrument as a contract *inter partes*, is settled by the law of the State where the contract is entered into; yet where such contract is made concerning personal property situated in another State, the latter may without violating any of the obligations of comity, uphold its own laws concerning the effect of such a contract upon the rights of third parties domiciled within such State.

7. IF A CHATTEL MORTGAGEE IN THIS STATE takes possession of the property mortgaged, and in good faith, according to the statute, advertises and sells the property, he is responsible to the mortgagor for only the surplus of the proceeds of such sale above the debt, interest and costs. But if he makes other disposition he is responsible for the difference between the actual cash value at the time and place of taking possession and the amount of the debt and interest.

8. IN ENFORCING REMEDIES, the *lex fori* governs.

Error from Brown county.

BREWER J., delivered the opinion of the court:

Plaintiffs in error, plaintiffs below, commenced an action of replevin to recover the possession of certain catttle. Judgment was rendered against them in the district court for the value of the cattle and they prosecute this proceeding in error to review such judgment.

A preliminary question is raised on the record, and counsel for defendants claim that it is not in such a condition that we can examine the alleged errors. It appears that the case was tried before a jury at the April term, 1875, and verdict returned. A motion for a new trial was duly filed but the hearing thereof was continued until the April term, 1876, at which time it was overruled and time given to make a case. Now, it is contended that the exceptions taking to the rulings at the trial must be reduced to writing at the term; that the continuance of the motion for a new trial does not continue the right to reduce the exceptions to writing, and that no exceptions having been reduced to

writing during the term, no subsequent reduction of the exceptions to writing is of any validity. Kline v. Wynne, 10 Ohio St. 223; Morgan v. Boyd, 13 Ohio St. 271. Whatever might be true if the case stood upon a bill of exceptions (and unless we departed from the Ohio decisions we should be compelled to hold such a bill of exceptions of no validity), we think our statutes warrant a case made with exceptions reduced to writing after the close of a term. There is no inherent vice in so reducing exceptions to writing; the legislature can authorize such action and the question is only one of policy. Until the provisions for a case made, the statute was clear and compelled action during the term. The court was not authorized to further extend the time. But the court is authorized generally to extend the time for making a case. No limitation is placed in the statute. Full discretion seems to have been granted. And the case made is not the mere collection of the pleadings and previously prepared bills of exceptions. It is itself the statement of the proceedings and evidence or other matters or so much thereof as is deemed necessary to present the errors complained of. Gen. Stat. p. 737, sec. 547. It is an original document and not a compilation. Extending the time to make it extends the time to make it completely and wholly. It may all be done on the very last day of the extended time. The testimony and exceptions may on that day for the first time be reduced to writing. This would seem logically to follow from the provisions of the general statutes. But as if to avoid any doubt the legislature in 1870 and again in 1871 amended by providing that "the exceptions stated in a case made shall have the same effect as if they had been reduced to writing, allowed and signed by the judge at the time they were taken." Laws 1870, p. 169, sec. 2; Laws 1871, p. 274, sec. 1. This plainly implies that the exceptions are first reduced to writing when the case made is prepared and declares that they are to have the same effect as if reduced to writing at the time they were taken. And the time in which they may be so reduced to writing is as extensive as the time for making the case.

So far as the motion for a new trial is concerned it has already been decided that it may be continued, and that the lapse of a term does not vitiate the motion or forfeit the rights of the moving party. Brenner v. Bigelow, 8 Kas. 498.

We are forced, therefore, to an examination of the record and the principal questions involved in it. A brief statement of the facts is necessary to a clear understanding of those questions. In the fall of 1871, the cattle in controversy belonged to O. P. Faulkner. At that time he executed the following bill of sale:

"UNION STOCK YARDS, CHICAGO,
"NOV. 4, 1871.

"*Know all Men by these Presents*, That I have this day bargained, sold and delivered to Denny & Redman, of the Union Stock Yards, Cook County, Ills., three hundred and seventy-five (375) Texas cattle, that are now feeding on my farm in Richardson County, Nebraska. Cattle are all branded with the letter R. O. P. FAULKER."

This instrument, though in form an absolute bill of sale, was found by the jury to have been intended as only a security. It appears that Faulkner received some money thereon from Denny & Redman, and shipped some cattle to them. The balance remained in his possession at his farm in Nebraska until his death, in May, 1872, and are the cattle in controversy. No filing or record was made of this bill of sale in Illinois, Nebraska or Kansas. May 31, 1872, O. P. Faulkner died, and on June 10th, Hedwig Faulkner, his widow, was appointed administratrix by the Probate Court of Richardson County, Nebraska. During the life time of O. P. Faulkner, two suits were commenced against him, and a portion of these cattle was taken under attachments therein by the sheriff of Richardson County. June 17th, 1872, this action was commenced in Brown County, Kansas. The cattle were then in Kansas, being in charge of herders employed by Faulkner in his life time and continuing in the employ of his administratrix after his death. They were feeding on the range in day time and herded at night at the farm of one Floyd Crandall, in Brown county. The possession of the herders was the possession of the administratrix, except so far as divested by the levy under the attachment. It would seem probable, though the facts are not explicitly found, that at the time of the seizure under the attachments, the death of O. P. Faulkner, and the appointment of his administratrix, the cattle were on the Kansas side of the State line. In other words the court proceedings were in Nebraska and the property probably in Kansas. We say probably, for as the cattle were kept very near to the State line, they may in feeding have ranged on both sides of the line and actually been in Nebraska at the time of the levy and the appointment of the administratrix. We may not, however, in the absence of any finding and in the uncertainty of the testimony assume positively the fact either way. We must treat it as an unsettled question.

Upon this we remark that the bill of sale, whether its operation and force are to be determined by the laws of Illinois, where it was executed, or those of Nebraska, where the cattle were at the time of its execution, or those of Kansas, where they were subsequently found and where the litigation was had, was valid *inter partes*. As between Faulkner, the vendor, and Denny & Redman, the vendees, it conveyed the title to the property as security for the advances. Had the litigation arisen during the life time of Faulkner and been solely between him and Denny & Redman, the right of possession would have been adjudged in the latter. The difference, judging from the portions of the statutes admitted in evidence, between the laws of Illinois on the one hand and those of Kansas and Nebraska on the other in this matter is that by the former such a conveyance unaccompanied by a delivery of possession, or what is deemed an equivalent, registration, would be absolutely void as against creditors and subsequent purchasers, while, by the

latter, it would be simply *prima facie* void. Gross statutes of Illinois, 3d. ed. 1869, chap. 20, Chattel Mortgages; Mumford v. Canty, 50 Ill. 370; Revised Statutes, Nebraska, chap. 46, though see the case of Pyle v. Warren, 2 Neb. 241; Gen. Stat. Kansas, Chap. 43.

We remark, secondly, that the administratrix has no better rights than her intestate. She can claim no more against the bill of sale than could he. It is true, and counsel call our attention to the fact, that the Illinois statute provides that such a conveyance shall be void "as against the rights and interests of any third person or persons." They say that "certainly the administratrix is a third person, she is a trustee holding this property for the benefit of the creditors." We do not so understand that statute. The third person must be one having rights and interests other than those of the vendor, and not one who simply holds the same rights and interests. A purchaser is interested to the extent of the money he has paid, a creditor to the amount of his debt. But a mere donee, heir or legatee, or assignee, executor or administrator, has neither title nor interest other or different from those of the original vendor. As the vendor can not repudiate the sale, neither can any who simply stand in his place. An administrator does not, in this respect, represent the creditors. He can not sue, in the absence of express statutory authority, to recover property fraudulently conveyed away by his intestate. Crawford's Admr. v. Lehr, 20 Kas. 509. Neither can he defend against a conveyance made by his intestate, on the ground that it was void as against creditors. The creditors must protect their own interests. Again, as the law of a State, and the powers and processes of its courts, have no extra-territoral force, it follows that the appointment of an administratrix by the probate court in Nebraska did not vest in her the property of the decedent situate in the State of Kansas.

It may not follow that her possession was tortious, but whatever rights she possesses would spring from comity and the laws of this State, and not from the powers given her by the courts of Nebraska. Whenever a decedent leaves property in two States, it is common to have administration in each State, the principal in the State of his domicil and an ancillary in the other. And a State always has the right to protect home creditors by administration of the decedent's property within its borders. So that if administration had been taken out in Brown county, Kansas, the administrator so appointed would have had the right to the possession of the cattle in that county as against the administrators appointed in Nebraska. In Story on Conflict of Laws, § 512, it is said: "In regard to the title of executors and administrators derived from a grant of administration in the country of the domicil of the deceased, it is to be considered that that title can not *de jure* extend as a matter of right beyond the territory of the government which grants it, and the movable property therein, as to movable property situated in foreign countries, the title, if acknowledged at all, is acknowledged *ex comitate;* and, of course, it is subject to be controlled or modified as every nation may think proper, with reference to its own institutions and its own policy, and the rights of its own subjects. And here the rule to which reference has been so often made, applies with great strength that no nation is under any obligation to enforce foreign laws prejudicial to its own rights, or to those of its own subjects. Persons domiciled and dying in one country, are often deeply indebted to foreign creditors, living in other countries, where there are personal assets of the deceased. In such cases it would be a great hardship upon such creditors to allow the original executor or administrator to withdraw those funds from the foreign country without the payment of such debts and thus to leave the creditors to seek their remedy in the domicil of the original executor or administrator, and perhaps there to meet with obstructions and inequalities in the enforcement of their own rights from the peculiarities of the local law."

But no question arises here between two administrations or between a foreign administrator and a home creditor. The administratrix appointed in the domicil of the decedent had acquired possession of the property, and it is immaterial whether she had first taken possession in Nebraska and afterwards moved the property into Kansas or had in the first instance taken possession in Kansas. In the absence of any opposing administration the courts of this State *ex comitate* will recognize the title and possession of personal property in this State in the administrator appointed in the domicil of decedent. Payment to such an administrator of a debt due to the decedent will be good. Brown v. Brown, 1 Barb. Ch. 189; Vroom v. Van Horne, 10 Paige, 549; Parsons v. Lyman, 20 N. Y. 103. He may sue or be sued in like manner and under like restrictions as any other non-resident. Gen. Stat. p. 472, sec. 203; Cady v. Bard, 21 Kas. .... The rule is not the same however as to the possession of the sheriff. His service of process and seizure of property within this State would be absolutely void. The laws of Nebraska could give him no power to act in Kansas, and comity does not require any recognition of his power beyond their territorial limits. Comity is satisfied when it recognizes the validity of his acts done within those limits. No State can ask that its officers be permitted to serve process within the limits of a sister State, and no State can recognize as of any validity the seizure of property within its borders by the officers of another sovereignty, acting under process from the courts of that sovereignty. Pointing to her territorial boundaries: "thus far shall thou go and no farther," is the voice of each State to the officers of every other State. A sheriff in seizing property is compelling an unwilling transfer, and the courts of this State can alone compel such a transfer of property within her borders. The adjustments of rights, the settlement of controversies, the forcible transfers of property, must be by the officers of the State and in obedience to the laws of the State and the decrees of its courts. No foreign tribunal can exercise jurisdiction over persons or property within her borders. This is essential to sovereignty so that if the cattle in con-

troversy were in Kansas at the time of the seizure by the sheriff such seizure was void and no title or right of possession passed to him thereby.

On the other hand, if the cattle were in Nebraska at the time of the seizure then his title thereby became good and will not be divested by the fact that they afterwards ranged over the line into Kansas. In other words, whatever title was acquired to the property while in Nebraska under the laws of Nebraska will be recognized in this State. The title acquired by a levy will be recognized equally with that acquired by a bill of sale. Generally one State recognizes titles and rights acquired and vested in another State to property in that State. There may be some conflict and some exceptions to this rule, but so far as the case at bar is concerned, it rests upon the clearest obligations of comity. "Whenever personal property is taken by arrest, attachment or execution within a State, the title so acquired under the laws of the State is held valid in every other State." Story on Conflict of Laws, sec. 550.

It becomes important, therefore, in determining whether creditors have acquired any valid liens which they may assert as against the bill of sale, to know whether the levy under the attachment was actually made in Nebraska or Kansas. If the former, the sheriff's title must be recognized; if the latter, it is of no validity.

There is another question which may arise in the future disposition of this case which requires notice. As we have seen this bill of sale, by the laws of Illinois, Nebraska, and Kansas, alike, was good *inter partes*, but in the absence of record and a delivery of possession was by the laws of the former State absolutely void as against creditors and subsequent purchasers, while by the laws of Nebraska and Kansas it would be only *prima facie* void, and might be upheld as against them by proof of good faith and sufficient consideration. Now, the question may arise as to the laws of which State shall control. It is a general proposition that as to personal contracts, and contracts concerning movable property, the *lex loci contractus* governs. In other words, whatever goes to the form, manner of execution, and all other matters affecting the validity of the instrument as a contract *inter partes*, is settled by the law of the State where the contract is entered into. And such a contract, if valid where executed, will be enforced in the courts of every other State, provided, at least, the same is not in conflict with the system of jurisprudence, and does not contravene the policy of such other State. As said by Mr. Justice Porter, in Ohio Ins. Co. v. Edmondson, 5 La. R. 295: "By the comity of nations, a practice has been adopted by which the courts of justice examine into and enforce contracts made in other States, and carry them into effect according to the laws of the place where the transaction took its rise. This practice has become so general in modern times, that it may be almost stated to be now a rule of international law, and it is subject only to the exception that the contract to which aid is required should not, either in itself or in the means used to give it effect, work an injury to the inhabitants of the country where it is attempted to be enforced." And in Scudder v. Bk., 1 Otto, 406, 2 Cent. L. J. 287, the court said: "Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought." And where a contract is made in one State, and valid by the laws of that State, concerning personal property situated in another State, it may well be that the latter, conceding its validity *inter partes*, shall uphold any of its own laws concerning the effect of that contract upon the rights of third parties domiciled within such State. In pursuance of this, it was early held in this court in Golden v. Cockrill, 1 Kas. 259, that a chattel mortgage executed and recorded in Missouri according to the laws thereof upon property situated in this State was invalid as against creditors here. At the time of such execution and record there was no law in force in Kansas providing for the registration of chatttel mortgages, and by the common law delivery was essential to the validity of such a conveyance as against third parties. Now our statutes provide that a chattel mortgage executed by a non-resident upon property within the State shall be filed in the county where the property is situate. Gen. Stat., p. 584, sec. 9. So that the policy of this State in reference to the protection of creditors and subsequent purchasers is now plainly expressed in its statutes. We are not advised by anything in the record as to the laws of Nebraska in this respect, and shall not therefore express any opinion thereon. It may also be remarked that if the claimants under this bill of sale rest their claims upon the laws of the State where they reside and where the instrument was executed they would take nothing as against creditors, and they are not prejudiced if the courts of this State enforce as against them the policy of this State as expressed in its statutes, or the laws of Nebraska where the property was situate at the time of the execution of the bill of sale.

One further matter we shall notice and then close this opinion. It appears that the claimants under this bill of sale after taking possession of the property shipped it to Chicago and sold it. Now, the bill of sale having been found to have been only a security, their interest in the property would in no event exceed their advances with interest and cost. Such is certainly the law of Kansas and such it is believed is the law generally. See Herman on Chattel Mortgages. And in determining the remedies under a contract the *lex fori* governs. Hence if they had proceeded in good faith under the statute to advertise and sell the property after taking it into their possession, their liability would not have exceeded the surplus of the proceeds of such sale above their debt, interest and costs. Having made other disposition their liability must be the excess of the value of the cattle at the time and place of seizure above such debt and interest. Perhaps a claim for such

liability could be enforced in this action only by a supplemental answer setting forth the facts of such disposition, but if so leave should be given to file such answer that the rights of the parties may be finally adjudicated in this action.

We forbear further remarks upon this case, but because the case was not decided in accordance with the views herein expressed, direct a reversal of the judgment and a new trial. All the justices concurring.

LEGAL REFORM.

Up to the adoption of the Constitution of Indiana of 1851, no person could practice law in that State until he was examined by the judges of the Supreme Court, or by two circuit judges, and found qualified. By article VII., section 21 of that Constitution it is provided that, "every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice." "Residence" is all that is required as a qualification for the office of judge of any of the courts of that State. As a matter of fact judges are generally selected from the profession; but this is not required by law. And as no examination as to qualification or fitness is required on admission to the bar, there is of course no restriction as to who shall administer justice in the courts of that State.

An elective judiciary and a free admission to the bar, so popular a few years ago, and so often the subject of discussion on the "stump" and in the public press, has not resulted in the good that was promised for them. Indeed, no one who has carefully observed the operations of the new order of things can for a moment doubt that the result has been evil and only evil. An examination of the reports of the decisions of the court of last resort in that State, will demonstrate the fact that a very large per centum of the cases which reach that court go off and are decided upon some technical quibble, in no wise affecting the merits of the case, the result of a want of skill in the attorney managing it, or in some awkward blunder of the judge who tried it in the lower court.

It is hardly necessary to remind the professional reader that in every well defined system of municipal law, there is a natural and well-considered division, into declaratory, directory, remedial, sanction or vindicatory; all of which divisions are embraced in the more comprehensive one of rights and remedies. There has never been much difficulty in defining the former; the great trouble has been in the latter; not so much in the machinery by which the law is to be administered as in the practical workings of the machinery in giving effect to the rules of law, so that the result in each given case is the success of the right and the defeat of the wrong. Pleading, evidence and practice may all be reduced to elementary principles; but in the complications of human transactions, the application of these principles in the administration of justice becomes not only difficult, but it requires an extent of learning and mental vigor rarely possessed either by the judge on the bench or the attorney conducting the cause. And when you add to this the twelve unlearned men, who are to pass upon the facts, and by a general verdict embody those facts with the law, it is not to be wondered at that the casual observer is lead to exclaim, "O the uncertainties of the law!"

What then, is the first and great reform required? The answer is obvious—increase the learning and ability of the bench and bar. But you may say with truth that you cannot legislate learning and ability into the heads of the judges and lawyers. What then, can be done? The first thing is to elevate the standard of the legal profession. It is idle to say that every voter of good moral character has the right to practice law. What is the legal profession? It is a body of men set apart by their learning in the law to aid the courts in the administration of justice. Whether you require evidence of learning or not, none can practice law with any degree of success without such learning. The practice of the law is not an ordinary employment, such as farming, blacksmithing or shoemaking. You now require an oath of a lawyer before he is permitted to practice. He is now liable to be disbarred for professional misconduct; would it be any more unreasonable to require of him some previous training to fit him to meet these responsibilities? If you were going to make a tailor of your son you would put him to learn the trade. If your son expected to be a civil engineer, he would study mathematics. Indeed, there is no kind of business that can be pursued with success without some previous preparation and training. The "merchant prince" has been in early life the merchant's clerk, or even perhaps the merchants' errand boy. The great civil engineer has perhaps carried the "rod."

But what shall be this previous training for the bar? In England a residence in the "Inns of Court," with its readings and its practice in its moot-courts for a given period is required. In this country the law school and the examinations of the applicant by the judges of the court have hitherto been the usual channel through which come the members of the legal profession in the States requiring any qualification for admission to the profession.

Many of the law schools are of a very high order. Some of the best legal minds in the nation have been trained in them. But, as now organized and sustained, they can not meet the wants of the country. We have a National as well as a State judicial system. We have the Federal and we have the State courts to be supplied with judges and lawyers. There are about forty-five thousand lawyers engaged in the active practice of the profession in the United States. Besides the Federal judges, each State and Territory has a large number of judges. In Indiana (the State in which the writer lives), there are five judges of the supreme, thirty eight of the circuit, and some seven or eight of the superior and criminal courts, aggregating some fifty. Indiana may be considered about an average State. The thirty-eight States, without including

the District of Columbia or the territories, would make up an aggregate of some nineteen hundred judges. The graduates of the present law schools would not much more than supply the bench.

A great national law school at the capital, is not only desirable, but I submit a necessity. Such a school ought to be established and maintained under national authority. It ought to be of a high order, indeed it ought to be the model school, with its own complete "library," dedicated to, and to be used for the advancement of legal learning. A high standard both of scholarship and legal acquisition ought to be maintained. Its degrees ought to be conferred only when merited. Besides this, each State ought to establish and maintain a law school with a complete law library of its own, affording the means of a complete training to every young man of energy and natural ability, who might wish to enter upon the study of the law. No man should be enrolled as an attorney who lacked either learning or moral character. A license to practice law ought to mean something. It should be regarded as important as the commission of the judge. Professional misconduct should be punished not only by fine, and in some cases by imprisonment, but the delinquent should have his name stricken from the roll of attorneys. R. C. G.

SOME RECENT FOREIGN DECISIONS.

RIPARIAN PROPRIETOR — RAILWAY COMPANY — WATER FOR SUPPLY OF ENGINES.—*Earl of Sandwich v. Great Northern R. Co.* English High Court, Chy. Div. 27 W. R. 616. A railway company who are riparian proprietors are entitled to abstract from the stream a supply of water for their locomotive engines, provided that the supply taken is reasonable and does not interfere with the rights of lower proprietors.

COSTS—EXECUTORSHIP EXPENSES,—*Sharp v. Lush* English High Court, Chy. Div. 27 W. R. 528. "Executorship expenses," like "testamentary expenses," include the costs of an administration suit; they also include the costs of the funeral, and the costs of warehousing specifically bequeathed chattels during the realization of the estate, and also rent accrued due since the testator's death for a house of which he was tenant from year to year.

STOPPAGE IN TRANSITU—CONTRACT TO DELIVER FREE ON BOARD—DESTINATION NOT STATED—DURATION OF TRANSIT. — *Ex parte Rosvear Clay Co.* English Court of Appeal, 27 W. R. 591. 1. In a contract to deliver goods free on board, although no destination is mentioned, it is implied that they are delivered to be carried, and so long as they remain in the hands of the shipmaster as carrier, the vendor's right of stoppage *in transitu* remains. 2. To end the *transitus* there must be actual delivery of the goods to the vendee or his agent, not a mere constructive delivery such as that to a shipmaster on the order of and engaged by the vendee.

SALE OF GOODS — DIVISIBLE CONTRACT—RIGHT OF PURCHASER TO REJECT.— *Reuter v. Sala.* English Court of Appeal, 27 W. R. 631. The plaintiffs agreed to sell and the defendants to buy about twenty-five tons (more or less) of Penang black pepper, October or November shipment from Penang to London, per sailing vessel or vessels, at fourpence and three-sixteenths of a penny per pound, * * * the name of the vessel or vessels, marks and full particulars to be declared to the buyer in writing within sixty days from the date of the bill of lading. On the 22d of January within sixty days of the date of three respective bills of lading, the plaintiffs declared twenty-five tons of pepper in three distinct parcels shipped on board the Borga, five tons of which, being a December shipment, were not in accordance with the contract. The defendants refused to accept the twenty-five tons. Subsequently, but after the sixty days within which the pepper was under the contract to be declared, the plaintiffs declared other five tons of pepper shipped in November on board the same vessel, in substitution for the five tons previously declared but which were not shipped till December. On the arrival of the ship the plaintiff tendered the whole twenty-five tons of pepper, and the defendants refused to accept any portion thereof. *Held* (by Thesiger and Cotton, L. J.J.: diss. Brett, L. J.), that the contract was an entire contract, that the time within which the pepper was to be declared was an essential condition which had not been complied with, and that, therefore, the defendants were not bound to accept any portion of the pepper. Per BRETT, L. J., that the plaintiffs were entitled to recover in respect of twenty tons, leaving the defendants to a cross-action in respect of five tons.

TRADE-MARK ON EXPORTED GOODS — NAME ACQUIRED FROM THE MARK — DECEPTION OF ULTIMATE PURCHASER ABROAD — GOODS KNOWN BY A VARIETY OF NAMES—FRAUDULENT DESIGN, WHETHER NECECSARY — BURDEN OF PROOF — COMMON DEVICE—REFUSAL TO REGISTER.—*Orr v. Johnston.* English High Court, Chy. Div. 27 W. R. 573. 1. Where a certain trade-mark is habitually placed on certain goods exported abroad, from which a certain name has been acquired for the goods in the foreign markets, an injunction will be granted to restrain the export of goods under another trade-mark which may deceive the ultimate purchaser abroad, though it would not deceive Englishmen, nor the dealers in the foreign markets. And this will be so, though the probable deception depends upon the name acquired by the goods, and not upon a comparison of the marks side by side. 2. The fact that a trader's goods are known by a variety of different names does not prevent his having a right which will be protected in respect of each of such names and the trade-mark from which they are all derived. 3. If a probability of deception is established, it is not necessary to prove an actual fraudulent design on the part of the defendant. 4. Where a material and a substantial part of a trade-mark has been taken by a rival trader, the onus lies upon the latter to disprove the probability of deception, and not upon the plaintiff to show that deception is to be apprehended. 5. To establish that a device is common to a trade it is not sufficient to produce a number of similar devices, without showing that they have been used or known. 6. A refusal to register a trade-mark under the trade-marks registration acts, 1875-7, does not affect the pre-existing right of the owner of the mark to protection.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF MICHIGAN.

April Term, 1879.

COMMISSIONERS ON DECEDENTS' ESTATES—DEFINITION OF "COURT."—1. Commissioners on a deceased person's estate act judicially in passing on claims, but are not a "court" in the constitutional sense; and Comp. L. 1861, § 4420, authorizing their ap-

pointment is not unconstitutional. Fish v. Morse, 3 Mich. 34; Clark v. Davis, 32 Id. 157; Streeton v. Paton, 7 Mich. 347. A court in the constitutional sense is a permanent oaganization for the administration of justice, and not a special tribunal for a particular exigency. 2. The term officer in the constitution (art. 18, § 1) applies to the occupant of an office that has some permanence, and is not created by a temporary nomination for a transient purpose. Underwood v. McDuffee, 15 Mich. 366. 3. The conclusion reached by the commissioners, if within their power and not appealed from, is final. All claims for or against the estate must be passed upon by the commissioners, and can not be withdrawn for adjudication elsewhere. People *ex rel.* Green v. Probate Judge, 40 Mich. 244. The objection that a claim is barred should be raised before the commissioners on an appeal, and can not properly be considered in an action. Opinion by MARSTON, J.—*Shurbun v. Hooper.*

CONFLICT OF JURISDICTION — EXEMPTIONS IN BANKRUPTCY.—An assignee in bankruptcy of a partnership took possession of the stock, and the question arising whether each of the two partners was entitled to an exemption of $250 in value under Comp. L. 1871, § 6101, clause 8, he refused to allow more than one exemption to the two partners, and proceeded to make sale. One partner claimed the full exemption in his own behalf, and the wife of the other brought action under Comp. L. § 4805 which permits the wife to sue in her own name for property which the law exempts as against her husband's debts. *Held*, 1. The bankruptcy court has exclusive jurisdiction of suits to determine an assignee's right to property where the exemption is disputed under the exemption clause of the bankrupt law (Rev. Stat. U. S, § 5045). This is so, at least where a selection or valuation is necessary for setting apart the exempted property. See Voorhies v. Frisbie, 25 Mich. 476, on the question of jurisdiction. 2. An assignee in bankruptcy, like a sheriff levying execution, is entitled to at least temporary control of exempted property until it can be set apart from the rest. 3. When the assignee has sold property his authority as assignee ceases, and his neglect to deliver it is a personal breach of duty, not official. 4. Where no recovery can be had under the bill of particulars, a new trial is not granted on reversal. Opinion by COOLEY, J.—*Sheldon v. Rounds.*

CONTRIBUTORY NEGLIGENCE—MASTER AND SERVANT—RISKS OF EMPLOYMENT.—Plaintiff sues for damages for injuries received while working in defendant's saw mill. *Held* 1. That an employer who introduces improved and complex machinery must take such corresponding precautions to keep his employees from harm in using it as are customary with prudent men. Cooley on Torts, 566-7, and cases cited: M. C. R. Co. v. Dolan, 32 Mich. 513. 2. An employer must furnish a suitable place in which his servant, with due care, may do his work without exposure to dangers that are not usual to his occupation as ordinarily performed, Coombs v. New Bedford Cordage Co., 102 Mass. 572. 3. An employee assumes the risks of his employment when the machinery used is not defective, and the usual means are adopted to guard against accidents. But if he voluntarily remains in service in spite of deficiency in either respect, and without any promise by the master to correct them, he is without remedy for any injury suffered in consequence. The master is guilty of negligence, and the servant of contributory negligence. 4. An employee is not bound, before beginning work to familiarize himself with the condition of all the machinery he may come in contact with. It is enough if he knows his own work and the risks directly connected with it. 5. If a servant shows that he has been injured in consequence of any unusual risk due to his master's negligence, the master has the burden of showing that the servant knew of the increased danger. Cooley on Torts, 661, *et seq.* 6. When the fact of contributory negligence depends on the credibility of witnesses, or upon inferences in which intelligent persons may honestly differ, it is a question for the jury. Conely v. McDonald, 40 Mich. 150, 8 Cent. L. J 229; R. R. v. Slatterly, 39 L. T. (N. S.) 266. 7. Contributory negligence presumes a careless act or omission. 8. The age, intellegence and experience of one who has suffered from an injury, help determine whether he has been guilty of contributory negligence. Reed v. Northfield, 13 Pick. 94; Whittaker v. West Boyleston, 97 Mass. 273. 9. Where a workman employed in a saw mill to carry slabs from the gang-plank, while pulling backwards at one that was too heavy for one man to carry, slipped on some wet bark and fell against some cog wheels that caught his pantaloons and injured him—he not having been warned and not knowing that the wheels were uncovered—the question whether he was guilty of contributory negligence should have been left to the jury. Opinion by MARSTON, J.—*Swoboda v. Ward.*

SUPREME COURT OF OHIO.

[Filed June 24, 1879.]

DYING DECLARATIONS — WHEN ADMISSIBLE — ABORTION.—1. The general rule of evidence is that dying declarations are admissible only when the death of the declarant is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. 2. Upon an indictment for unlawfully using an instrument upon the person of a woman with an intent to destroy a vitilized embryo, in consequence of which she died, her dying declarations are inadmissible. Exceptions overruled. Opinion by GILMORE, C. J.—*State v. Harper.*

BOND—FRAUD IN EXECUTION.—Four persons, including the defendant, agreed to execute a bond to the plaintiff. One of the persons who was to execute the bond, by fraud procured a bond to be executed and delivered by the defendant, in which the names of two of the persons who were to join the execution were omitted: *Held*, 1. That the fraud constituted no defense to a suit on the bond, where the plaintiff had no notice of the fraud at the time he accepted the same and parted with the property in consideration of which the bond was given. 2. That the plaintiff might have required the bond to be executed by all the parties, but he was not bound to do so. He might waive his right to require the bond to be thus executed by all the parties; and the fact that the bond presented to the plaintiff and accepted by him, was the bond of the two parties only, is no evidence to charge him with notice of the fraud practiced in its procurement. Opinion by WHITE, J.—*Dagler v. Baker.*

EMBEZZLEMENT — WHO IS AN "EMPLOYER" — CONSTITUENTS OF CRIME.—1. Upon a trial, under an indictment containing a single count charging the defendant with the embezzlement of moneys, where it appears that the moneys were the proceeds of several notes placed in his hands by his employer at different times and collected by him from different persons and at different times, such facts alone do not constitute a ground for requiring the prosecutor to elect upon which of the sums so collected the State will rely for conviction. 2. A person, having in his possession certain promissory notes as indorsed, who employs an agent to collect the same and account to him for the proceeds, is an employer, within the mean-

ing of the act against embezzlement; and upon the trial of the person so employed for the embezzlement of the proceeds, it is no defense to show that his employer was bound to account to another for the moneys. 3. When a person, not engaged in the business of collecting moneys for others as an independent employment, is employed to collect money for another, subject to his direction and control, the relation of principal and agent is thereby created. And in such case the agent may be guilty of embezzlement, although he was to receive for his services a percentage of the moneys collected. 4. When an agent is prosecuted for the embezzlement of his employer's money, in a certain county wherein he had possession of the money and in which it was his duty to account to his employer upon demand being made, it is no defense to show that he had expended the money for his own use in another county. 5. Under an indictment for embezzlement which charges the offense to have been committed after the act of May 5, 1877 (74 Ohio Laws, 249, sec. 11), took effect, the defendant can not be convicted for an offense committed before the taking effect of said act, notwithstanding the right of the State to prosecute for the violation of a former statute (66 Ohio Laws, 29,) which was repealed by the act May 5, 1877), was saved by the act of February 19, 1866 (S. & S. p. 1.) Judgment reversed and cause remanded for a new trial. Opinion by McILVAINE, J. —*Campbell v. State.*

SUPREME COURT OF MISSOURI.

April Term, 1879.

[Filed June 2, 1879.]

PROMISSORY NOTE — MATERIAL ALTERATION AVOIDS IT AGAINST PARTIES INTERESTED—ON APPEAL FROM JUSTICE OF THE PEACE NON EST FACTUM MAY BE PLEADED IN CIRCUIT COURT.—Action before justice of the peace on a promissory note. Judgment for plaintiff. The facts sufficiently appear from the opinion. 1. It was perfectly competent for defendants to file plea of *non est factum* for first time in circuit court since the trial in that court was *de novo*. Phillips v. Bliss, 32 Mo. 427. 2. The payee of the note had no right to alter the note in the slightest particular, without consent of all who were interested; and such unwarranted alteration rendered note null in his hands, no matter how pure his motive in making the alteration. Haskell v. Champion, 30 Mo. 136; Evans v. Foreman, Id. 449; Bank v. Armstrong, 62 Mo. 59; Bank v. Dann, Id. 29. 3. Judgment for plaintiff must be reversed, because there was no evidence to sustain it, his own testimony showing that he altered the note. Under such circumstances the court interferes, regardless of declarations of law given or refused. Hart v. Leavenworth, 11 Mo. 629; Robbins v. Phillips, Oct. T. 1878. Opinion by SHERWOOD, C. J.—*Moore v. Hutchinson.*

TRUSTEE'S SALE OF REAL ESTATE—TRUSTEE MUST BE PRESENT DURING PROGRESS OF SALE TO RENDER IT BINDING ON PURCHASER FROM AUCTIONEER.—Action for specific performance of purchase of real estate at trustee's sale. The sale took place at court house, the auctioneer or crier standing in the door, and bidders inside the hall. Trustee was present at the court house door before the sale began and after it ended, but during the sale was not at the court house, but in a saloon on the opposite side of the street, and was not present at the sale. The circuit court found for defendant, which judgment the Court of Appeals affirmed, and plaintiff brings the case here by writ of error. Counsel for plaintiff contended that such an absence from the place of sale, as testified to by trustee, would not avoid the sale; that he was present at its conclusion to do all that he might have done had he been present at the actual crying of the sale. *Held*, that it was the duty of the trustee to be present during the crying of the sale, to observe the progress thereof, protect the interests of all parties concerned, to reject fraudulent bids made to frustrate the sale, and, if necessary, to adjourn the sale. Graham v. King, 50 Mo. 22; Bales v. Perry, 51 Mo. 452; Vail v. Jacobs, 62 Mo. 130; Perry on Trusts, §§ 779, 780; Gray v. Viers, 33 Ind. 18. If the auctioneer may lawfully make sale in the absence of the trustee, and should, during his absence, accept a bid, and declare the person making the same to be the purchaser, and, by proper memorandum in writing, complete the sale, it would be out of the power of the trustee to set such sale aside. White v. Watkins, 23 Mo. 427; and in this way the trustee might substitute the auctioneer for himself in the exercise of that very discretion which the law declares is a personal trust, and can not be delegated. The trustee should be present to sanction the acceptance of any bid by the auctioneer, before any binding memorandum of sale can be made. Affirmed. Opinion by HOUGH, J.—*Brickenkamp v. Reis.*

BOOK NOTICE.

CASES ARGUED AND DETERMINED IN THE COURT OF APPEALS OF TEXAS during the latter part of the Tyler Term, 1878, and the early part of the Galveston Term, 1879. Reported by JACKSON and JACKSON. Vol. 5. St. Louis: F. H. Thomas & Co. 1879.

This series, as is pretty generally known, consists exclusively of criminal cases—the State of Texas having two appellate courts of last resort, one with jurisdiction only in civil cases, the other with jurisdiction only in criminal cases. A natural consequence of this, or rather a result which one would ordinarily look for from these circumstances, should be that the decisions of each court would be more carefully and knowingly rendered than under a system which imposes upon a number of judges sitting on appeal the decision of questions arising in every one of the many branches of the law. A glance at the volume before us serves in part to confirm this impression. Almost every case is a reversal. In turning over the pages it is impossible to repel the thought that if the trial judges whose rulings in the cases reported in this volume, so seldom receive the approbation of the Court of Appeals, were a little more learned in the law of crimes and its procedure, it would be much better for that justice which not only in Texas but in Missouri loses half its terrors by loosing all its swiftness. It is true nevertheless that the publication of the rulings of the highest court, in the present style and form, will do much to remedy this evil. The present volume, like the former, is carefully prepared, well printed and bound. It contains 705 pages, and reports 120 cases.

QUERIES AND ANSWERS.

QUERIES.

4. SALE OF GOODS FOR IMMORAL USE.—If A, the keeper of a house of ill-fame, purchases goods upon credit from B, a merchant, and informs him at the time of such purchase that she intends to use said goods in her business as the keeper of such house, can B afterwards maintain an action against A for the price of said goods? J. B.

St. Louis, Mo.

ANSWERS.

No. 2.

[9 Cent. L. J. 19.]

1. In order for a married woman to convey her lands, or release potential dower in the lands of her husband, she must join in a deed containing *apt words* of grant or release. 4 Kent. 65. Signing, sealing and acknowledging an instrument in which the husband alone is grantor, is insufficient to pass the wife's estate, or bar her dower. Bank v. Rice, 4 How. 241; Hatcher v. Andrews, 5 Bush. 561; Hedger v. Word, 15 B. Mon. 106; Prather v. McDonell, 8 Bush. 46. 2. The weight of authority establishes the rule that married women are not estopped by matters *in pais*, unless their conduct has been fraudulent. See Bigelow on Estoppel, p. 473-490, where the authorities are fully collected and the doctrine discussed. In Glidden v. Strupler, 52 Penn. St. 400, a married woman conveyed by deed, signed by her alone, the purchaser took possession and made improvements, with her knowledge and *encouragement*. He paid her a part of the purchase money. It was held that she was not estopped.

Louisville, Ky. L. McQ.

No. 1.

[9 Cent. L. J. 19.]

"A person habitually insane has the power of contract in a lucid interval." Toser v. Saturlee, 3 Grant, Pa. 162; Jones v. Perkins, 5 B. Monr. 222; Hall v. Warren, 9 Ves. 605; Lilly v. Waggonner, 27 Ill. 395. It is the duty of the party who contends for a lucid interval to prove it; for a person once insane is presumed to be so until it is shown that he has a lucid interval, or has recovered. Swin. 77; Coke Litt., 185 N.; 3 Brown, ch. 443; 1 Const. So. C. 225; 1 Pet. 163; 1 Litt. (Ky.) 102. Inquisitions of lunacy may be read, but they are not generally conclusive against persons not actually parties. Sergeson v. Sealy, 3 Atk. 412; Den v. Clark, 5 Halst. 217, per Ewing, C. J.; Hart v. Deamer, 6 Wend. 497; Faulder v. Silk, 3 Campb. 126; 2 Madd. Chan. 578. Where a court has power to grant letters of guardianship of a lunatic, the grant is conclusive of his insanity at that time, and of his liability, therefore, to be put under guardianship against all persons subsequently dealing directly with the lunatic, instead of dealing, as they ought to do, with the guardian. Leonard v. Leonard, 14 Pick. 280. It seems clear that a lunatic is liable upon an executed contract for articles suitable to his degree, furnished by a person who did not know of his lunacy, and practiced no imposition upon him. Smith on Conts. (5th ed.), p. 343 and note 1, and authorities there cited. But it would seem to be the better opinion that an executory contract entered into by a lunatic of non-sane mind at the time he entered into it, can not be enforced against him; *sed quaere*. Ib. 347.

St. Louis, Mo. M. THOMPSON.

NOTES.

Every State in the Union, with one exception, that of Louisiana, has a Sunday law on its statute books, in each case following, in its main features, the statute of Car. II (1676), known as the Lord's Day Act. They prohibit labor on the first day of the week, commonly called Sunday (except works of necessity or charity) the transaction of ordinary mercantile business (except the selling of medicines), the keeping open of dram shops, and traveling for business or pleasure, with exceptions in favor of ferrymen and mail carriers. In some of the Southern and Western States there are special provisions against the besetting sins of the region. Arkansas punishes Sunday indulgence in "brag, bluff, poker, seven-up, three-up, twenty-one, thirteen cards, the odd trick, forty-five, whist or any other game of cards," by a fine of from $25 to $50. California charges from $50 to $500 in the shape of a fine for attending any "bull, bear, cock or prize fight, horse race or circus," or for keeping open any gambling house, "or any place of barbarous or noisy amusement, or theater where liquors are sold." Florida, for disturbing any congregation of white persons, provides a fine not to exceed $100, or that the offender shall be "whipped not to exceed thirty-nine stripes, or imprisoned not exceeding six months." South Carolina alone of all the States, sticks to the old notion of compelling attendance upon divine worship. Her statute still provides that all persons "having no reasonable or lawful excuse, on every Lord's day shall resort to some meeting or assembly of religious worship, tolerated and allowed by the laws of the State, and shall there abide, orderly and soberly, during the time of prayer and preaching, on pain of forfeiture, for every neglect of the same, of the sum of $1." The Illinois Sunday law is much milder than the laws of most of the other States. It only prohibits the keeping open of tippling houses, and disturbing the peace and good order of society by unnecessary labor, or amusement or diversion, with exceptions in favor of watermen and railroad companies.

THE constitutionality of the Indiana law prohibiting the sale of railroad tickets by "scalpers," has been affirmed by the Supreme Court of that State.——Under the new Constitution of California, the judges of the superior courts are to be mulcted of their monthly salaries, unless they can make an affidavit that no suit has remained undecided during three months.——According to the Scottish law (following the Roman law), the right to rent upon a lease of land, or the eatage of land, may be extinguished by the total destruction of the subject let; and a deduction for rent may be claimed where "the sterility or vastation" is not total; provided it be what is termed "*plus quam tolerabile*." What degree of sterility or vastation will make a loss that can not be borne is, says Erskine, nowhere defined; "but by common opinion, the tenant is liable for the rent if the produce of the crop exceed the expense of the seed and tillage"—a doctrine, which, however, has been doubted by Lord Cairns in Gowan v. Christie, L. R. 2 Sc. 283. In a recent case the defendant had taken the winter eatage of a farm at a rent of £25. It appeared from the evidence that the defendant's flock of sheep had actually had only one week's keep on the farm, and that owing to the extraordinary severity and duration of the snow storm, they could not possibly have lived more than one month or five weeks on the herbage of the farm. In spring the defendant called on the plaintiff and paid him £12 10s., refusing to pay the other half of the rent, on the ground that in the exceptional circumstances he was not able to avail himself of the eatage. The plaintiff sued him for the balance of rent, and the sheriff held that although, "in the absence of a stipulation to the contrary, the losses which lessees of eatage incur from bad weather and such causes in an ordinary season, must fall on themselves, the law had been frequently recognized that where the subject let is totally destroyed or rendered entirely unavailable to the tenant by causes which could not have been within the contemplation of the parties to the contract, the claim for rent ceases; and that if there is partial but substantial injury to, or diminution of the subject, there must be a corresponding deduction from the rent. The snow storm which covered this district for several months last winter, was in intensity and duration perhaps the most severe that had ever been experienced, even by the oldest inhabitants, and could not have been in the contemplation of the pursuer or defender when the contract was made;" and under the circumstances he held that the payment which the deendant had made was sufficient.